

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-749V

May 30, 2007

Not to be Published

CANDACE LOVETT, Administrator of the
Estate of SENI LOVETT,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Respondent.

Clifford J. Shoemaker, Vienna, VA, for petitioner.

Alexis B. Babcock, Washington, DC for respondent

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Entitlement; hepatitis B
vaccination was three months
before TM but URI was nine
days before TM; petitioner
did not file expert report
supporting claim

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition dated September 25, 1998, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B and diphtheria-tetanus

¹ Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

vaccines her son Seni Lovett (hereinafter, “Seni”) received caused him to have transverse myelitis (TM). Medical records have also diagnosed Seni with Guillain-Barre Syndrome (GBS).

On June 21, 2006, eleven months ago, the undersigned filed an Order stating, after a review of the medical records, that petitioner was unlikely to find an expert to testify on her behalf that transverse myelitis (TM) occurring nine days after an upper respiratory infection (URI) and three months after hepatitis B vaccine and/or Dt vaccine, was due to the hepatitis B vaccine and/or Dt vaccine. The undersigned gave petitioner until July 31, 2006 to show cause why this case should not be dismissed.

On July 31, 2006, petitioner responded by stating that petitioner had not yet had an expert review the case and was “hopeful that he can get an expert who will support his theory of causation in this matter.” Resp. at 4. (Petitioner is actually a woman representing the estate of the vaccinee.) Petitioner requested the undersigned schedule an onset hearing, ignoring the fact that the vaccinee and his mother were both dead.

On January 29, 2007, the undersigned denied petitioner’s request for an onset hearing and gave petitioner until March 30, 2007 to file an expert report. If petitioner, the aunt of the deceased, had any factual information to provide, petitioner could file her affidavit by February 28, 2007.

On February 28, 2007, petitioner made an oral motion for a 30-day extension of time to file petitioner’s affidavit. The undersigned granted the motion, making the affidavit due March 30, 2007.

On March 8, 2007, petitioner filed a response stating petitioner’s counsel was working with petitioner on providing petitioner’s affidavit and counsel was continuing to investigate the

issues in the case with a medical consultant and conferring with potential expert witnesses. On page two of the response, counsel stated petitioner might simply move for a judgment on the record after filing her affidavit.

On March 28, 2007, petitioner filed a Status Report stating, “Counsel has spoken to Petitioner and she has decided to no longer pursue her claim.” Petitioner’s counsel was waiting to receive a signed statement from petitioner giving him permission to file a motion for judgment on the record.

Over two months from March 28, 2007 have elapsed without petitioner’s counsel filing a signed statement from petitioner giving him permission to file a motion for judgment on the record. The undersigned does not need petitioner’s permission to dismiss this case. It is an eight-and- three-quarter-year-old case without a single expert medical report in support of petitioner’s allegations. The Vaccine Act, 42 U.S.C. §300aa-13(a)(1) does not permit the undersigned to rule on behalf of petitioner based solely on her own claims unsubstantiated by medical records or by medical opinion.

FACTS

Seni was born on February 19, 1982. On September 25, 1996, he received hepatitis B vaccine and diphtheria-tetanus vaccine. Med. recs. at Ex. 15, pp. 6, 32.

On February 17, 1997, Seni went to Grady Memorial Hospital. He had been healthy until two weeks prior to admission (approximately February 3, 1997 or over three months post-vaccination) when he had upper respiratory (URI) symptoms of clear rhinorrhea, and mild cough for two to three days. Then, approximately five days prior to admission (or February 12, 1997), he had an episode of back pain and weakness in his lower extremities bilaterally, progressing to

full paralysis by the day prior to admission (February 16, 1997). On physical examination, Seni's lower extremities were paralyzed with no reflexes. Sensory loss level was about L1. An MRI of Seni's spine showed swelling of the spinal cord at the T12-L1 level consistent with TM. There was enhancement of the lesion consistent with an acute change. Seni was discharged and transferred to Egleston Children's Hospital on February 25, 1997. Med. recs. at Ex. 16, pp. 2-3. (The undersigned has not been able to locate the Egleston records for February 25, 1997.)

Seni died from cardiopulmonary arrest due to TM on November 12, 2002. Med. recs. at Ex. 21, p. 1.

DISCUSSION

This is a causation in fact case. To satisfy her burden of proving causation in fact, petitioner must offer "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Secretary of HHS, 418 F. 3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation[.]" *i.e.*, "evidence in the form of scientific studies or expert medical testimony[.]"

In Capizzano v. Secretary of HHS, 440 F.3d 1274, 1325 (Fed. Cir. 2006), the Federal Circuit said "we conclude that requiring either epidemiologic studies, rechallenge, the presence of pathological markers or genetic disposition, or general acceptance in the scientific or medical

communities to establish a logical sequence of cause and effect is contrary to what we said in Althen....”

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, supra, at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

Petitioner must show not only that but for the vaccines, Seni would not have had TM and died therefrom, but also that the vaccines were substantial factors in bringing about his TM and death. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In Stevens v. Secretary of HHS, No. 99-594V, 2006 WL 659525 (Fed. Cl. Spec. Mstr. Feb. 24, 2006), the undersigned ruled that hepatitis B vaccine can cause TM and did so in that case. The onset intervals after Ms. Stevens' two hepatitis B vaccinations were eight and nine days, appropriate temporal periods for an immune reaction.

In the instant action, Seni's vaccinations occurred three months before he contracted TM. He was healthy before he contracted TM except for a URI two weeks before admission to the hospital. Onset of his back pain and weakness in his lower extremities was nine days after his URI. Seni's MRI showed enhancement of his spinal lesion, consistent with an acute change, not a chronic condition (thus consistent with the history of prior good health until the URI).

In the eight and two-thirds years since petitioner filed her petition, she has not filed one expert report in support of her claims. The difficulties the undersigned outlined for petitioner eleven months ago have indeed proved insurmountable. The petition must be dismissed for failure to prosecute.

CONCLUSION

This petition must be dismissed. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.²

IT IS SO ORDERED.

May 30, 2007
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.